No. 14537

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the use of Westinghouse Electric Supply Company, a corporation and all similarly situated,

Appellant,

vs.

JOHN V. AHEARN, SR., an individual doing business under the firm name and style of Ahearn Electric Company and THE AETNA CASUALTY AND SURETY COMPANY, a corporation,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANT

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STATUTES

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SUMMARY OF ARGUMENT

Appellees' brief appears to appellant to answer only two of the arguments urged by appellant in its brief. In essence, appellant argued that it was entitled to prevail for the following reasons:

(1) The District Court should have found a contract implied-in-fact;

(2) The District Court should have found that Ahearn benefited from his use of the latex cable and that there was a contract implied-in-law;

(3) The District Court should have found that plaintiff established all the facts requisite to recovery under the Miller Act.

Appellees' brief with respect to the latter argument is confined to the question of attorney's fees, and does not meet the arguments made in appellant's principal brief, pages 35-40.

Appellant will discuss briefly appellees' answers to each of the first two arguments.

THE DISTRICT COURT SHOULD HAVE FOUND A CONTRACT IMPLIED-IN-FACT

Appellees advance in their brief, pages 9-13, the argument that no contract implied-in-fact can be found in the instant case because Ahearn, while receiving, retaining and using latex cable, at all times denied his liability to pay for that cable, and that the law gives effect to his verbal denials to the exclusion of his conduct. The appellees argue, in effect, that where one obtains possession of goods in the absence of a contract therefor, he may use the goods without becoming liable for the price, so long as he denies any intention to pay for them. This argument is phrased on p. 12 of appellees' brief as follows:

"... a contract cannot be implied against the express declaration of the person to be charged."

In each of the cases cited by appellees for this proposition, the plaintiff delivered goods or property, or rendered services to the defendant, after being notified that the defendant denied any obligation or willingness to receive the goods or services on the plaintiff's terms. Notwithstanding the plaintiff's knowledge of the defendant's position, the plaintiff thereafter delivered the goods or rendered the services.

The irrelevancy of those cases to the present problem is plain. Here the plaintiff seller did not learn of defendant Ahearn's contention that he was not liable for the price of the latex cable until after the goods had been shipped to Ahearn, and it was Ahearn who retained and used the goods with full knowledge of the position of Westinghouse.

THE DISTRICT COURT SHOULD HAVE FOUND A CONTRACT IMPLIED-IN-LAW

It is submitted that the argument advanced by appellees in their brief, at pages 15-18, assumes the existence of a contractual obligation on the part of Westinghouse to deliver paper-wrapped cable to Ahearn in the third quarter of 1952. This is a convenient assumption for appellees but unfortunately for them is not supported by the facts of the case and the law applicable thereto.

A. *No Contract for Paper-Wrapped Cable Was Pleaded or Proven.*

The complaint pleaded an express contract between Westinghouse and Ahearn relating to latex cable. The answer merely denied the allegations of the complaint. The District Court found plaintiff Westinghouse had not sustained its burden of proving an express contract. (Findings of Fact XI, Tr. 22, 24.) That finding is not attacked on appeal.

It would seem that the claim of a right to receive and retain the latex cable without becoming liable for the price, by virtue of some agreement, would constitute a counterclaim, or an affirmative defense under Rule 8(c), Federal Rules of Civil Procedure. Assuming, however, that failure to plead the claimed contract could be cured and the answer amended to conform to the proof, no such amendment was requested and none was granted by the trial court.

The reason is clear - - - no such contract was proven. The evidence material to consideration of this question is reviewed briefly below:

(1) Pl. Ex. 3. This exhibit, dated January 31, 1952, is the Westinghouse quotation on materials required for the Navy yard contract and was submitted at the request of Ahearn's foreman. It quoted a price for paper-wrapped cable only since that was the item requested (Rockwell, Tr. 131-2). It clearly

states a delivery date of the third quarter of 1953 for paper-wrapped cable.

(2) Pl. Ex. 4. This exhibit, written February 5, 1952, is a purchase order written on Ahearn's form by Westinghouse's salesman, Upson. It specifies paper-wrapped cable and lists no delivery date, either for that or any other material. It is signed by Ahearn but not by Westinghouse or anyone on its behalf.

(3) Pl. Ex. 5. This exhibit, dated February 5, 1952, is a "re-write" or "take-off" of Pl. Ex. 4 on the Westinghouse order form. It provides a space for the signature of the customer but not the seller and specifies: "This Order subject to the Company's acceptance at its office."

(4) Pl. Ex. 6. This is a letter dated February 19, 1952, in which Westinghouse gives Ahearn the delivery dates on certain materials ordered on Pl. Ex. 4 and 5. It again advises Ahearn that the delivery date of paper-wrapped cable is the third quarter of 1953 and goes on to state that latex cable is available for third quarter of 1952 delivery.

(5) Pl. Ex. 8. This is a letter dated February 19, 1952 by which Ahearn forwarded Pl. Ex. 6 to advise the Navy of delivery dates on material for his Navy contract.

(6) Pl. Ex. 9. This is the Navy reply, dated March 7, 1952, to Pl. Ex. 8. It approves the use of latex cable.

(7) Testimony of Ahearn, Tr. 150, 180-181. Ahearn testified that on January 31, 1952 Upson stated that he could deliver paper-wrapped cable in August 1952 contrary to the provisions of the quotation. Ahearn further testified that when he later received Pl. Ex. 6 repeating the third quarter 1953 delivery date for paper-wrapped cable: "I didn't pay no attention to that. I sent it over to Pier 99 because I figured Westinghouse would fulfill their contract because he (Upson) stated there that he would get it on time there, and I didn't think anything more about the wire."

(8) Pl. Ex. 21 and 22 and Testimony of Upson, Tr. 202-5. These exhibits are the expense account of Upson covering the period including January 13, 1952 and establish that Upson could not have discussed Pl. Ex. 3 with Ahearn at the time testified to by Ahearn.

Summarizing the evidence, it may be seen that the order, Pl. Ex. 4, on which appellees place so much reliance, is silent as to delivery date for paper-wrapped cable. The only written evidence as to delivery date is contained in Pl. Ex. 3 and 6, and Ahearn's knowledge thereof conclusively appears from Pl. Ex. 8 and 9. These documents show delivery of paper-wrapped cable in the third quarter of 1953. In contradiction thereto Ahearn's testimony that on the same day he received Pl. Ex. 3 from Upson, Upson promised 1952 delivery on paper-wrapped cable

and that he, Ahearn, accepted that assurance and paid no further attention to the matter, is inherently unbelievable in the light of Pl. Ex. 6, 8 and 9. Upson's testimony that he made no such statements as to delivery date and in fact did not see Ahearn on the day when he is claimed to have made the statements, and the documentary evidence on that point, Pl. Ex. 21 and 22, seem conclusive on the matter to appellant.

Appellees face another difficulty. Pl. Ex. 4 and the "take-off," Pl. Ex. 5, are not signed by Westinghouse or anyone on its behalf. Appellees must point to an acceptance of the order for paper-wrapped cable by Westinghouse. The only writings related to paper-wrapped cable signed by Westinghouse are Pl. Ex. 3 and 6, both specifying delivery in the third quarter of 1953. To hold Ahearn's order, Pl. Ex. 4, a contract for 1952 delivery of paper-wrapped cable binding upon Westinghouse would do violence not merely to the evidence but to the statute of frauds section of the Sales Act, R.C.W. 63.04.050, L. Wash. 1925 ex. s. c. 142, Sec. 4, which provides in pertinent part, as follows:

> "A contract to sell or a sale of any goods . . . of the value of $500.00 or upwards shall not be enforceable by action . . . unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

There is no writing signed by the party here

sought to be charged, Westinghouse, which specifies delivery of paper-wrapped cable at any time prior to the third quarter of 1953.

The burden of proof as to the existence of the contract for third quarter of 1952 delivery of paper-wrapped cable would, of course, be on the appellees as the parties asserting such a contract. In appellant's view the evidence relating thereto is conclusive that no such contract existed but it is unnecessary to appellant's position that this court agree. In order to affirm the District Court on the theory that Ahearn had a contract right to receive paper-wrapped cable prior to the third quarter of 1953, this Court must hold that appellees have established such a contract by a preponderance of the evidence.

B. *The District Court Did Not Find A Contract for 1952 Delivery of Paper-Wrapped Cable.*

Appellant thinks it clear that the District Court did not find a contract for third quarter of 1952 delivery of paper-wrapped cable and refers to its original brief herein, at page 42, in that respect. It is true that in portions of his oral memorandum opinion, set forth verbatim in Finding of Fact XI (Tr. 20), the District Judge referred in some instances to Pl. Ex. 4 as a "contract or order" or "order and contract" (Tr. 20, 22). That language of the District Judge cannot be construed in the

manner contended for by appellees. The findings read in their entirety make it clear that the Judge rejected the oral testimony of both sides. The Judge said, "On all issues the Court decides in favor of the defendants because of lack of convincing proof and because the plaintiff has not sustained its burden of proof to establish the material allegations of the complaint by a preponderance of the evidence." (Tr. 24.) If the District Judge had considered that appellees had established a contract for the 1952 delivery of paper-wrapped cable, he could have said so simply and unequivocally, but he did not.

However, if this Court determines that the District Judge's findings must be interpreted as finding a contract for 1952 delivery of paper-wrapped cable, then appellant submits that this finding is clearly erroneous in the light of all the evidence set forth above.

CONCLUSION

Appellant again urges this Court to consider this case in its simple but essential outline as one in which goods have been retained and used by a party who disclaims liability for the price or value thereof, and appellant asks only that the claim of the right to do so be reviewed by the Courts.

Respectfully submitted,

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